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# The Juridical Nature of the Marital Community

George A. Kimball Jr.

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## COMMENTS

### THE JURIDICAL NATURE OF THE MARITAL COMMUNITY

The problem of devising a theory of the juridical nature of the marital community which will account for and be consistent with the specific rules governing the community in a given jurisdiction has long teased the imagination and intellect of legal scholars. The community has been compared to, or regarded as, a form of usufruct,<sup>1</sup> collective ownership,<sup>2</sup> ownership in indivision,<sup>3</sup> partnership,<sup>4</sup> and a distinct legal personality capable of acquiring legal rights and duties.<sup>5</sup> In the extra-judicial legal writings of Louisiana the little consideration given to this question has been limited principally to comparison of the community to a partnership.<sup>6</sup> While judicial opinion has ranged farther afield, treating the community at different times as a separate

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1. 16 BAUDRY-LACANTINERIE, *LE COURTOIS ET SURVILLE, TRAITÉ DE DROIT CIVIL* n°s 296-310 (3d ed. 1906) [hereinafter cited as BAUDRY-LACANTINERIE]; 3 PLANIOL, *CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE)* no. 973 (1959) [hereinafter cited as PLANIOL]; 6 TOULLIER, *LE DROIT CIVIL FRANCAIS*, Titre V, n°s 124-128 (6th ed. 1846) [hereinafter cited as TOULLIER].

2. The collective ownership theory stems from the old Germanic "ownership in the collective hand" which, although in existence in France and Spain prior to the fourteenth century, was early discarded. MCKAY, *COMMUNITY PROPERTY* §§ 40, 50, 53, 54 (2d ed. 1925) [hereinafter cited as MCKAY]; Comment, 25 *LA. L. REV.* 78, 82-83 (1964). Certain modern Spanish jurists have urged a revival of this theory, see Berdejo, *En Torno a la Naturaleza Juridica de la Comunidad de Gananciales del Código Civil*, 187 *REVISTA GENERAL DE LEGISLACION Y JURISPRUDENCIA* 7 (1950), but elsewhere outside Germany it has been rejected. See, e.g., 3 COLIN ET CAPITANT, *TRAITÉ DE DROIT CIVIL* n° 177 (10th ed. 1953) [hereinafter cited as COLIN ET CAPITANT]; 6 TOULLIER n°s 74-75.

3. E.g., 8 AUBRY ET RAU, *DROIT CIVIL FRANCAIS* n° 505 (6th ed. 1948) [hereinafter cited as AUBRY ET RAU]; 16 BAUDRY-LACANTINERIE n° 250; 3 COLIN ET CAPITANT n° 174; 3 PLANIOL no. 905.

4. E.g., 8 AUBRY ET RAU n° 505; AZEVEDO, *COMMENTARIORUM IURIS CIVILIS IN HISPANIAE REGIAS* (1597), transl. in ROBBINS, *COMMUNITY PROPERTY LAWS* 140, 149, 156 (1940) [hereinafter cited as AZEVEDO with page reference to ROBBINS transl.]; 3 COLIN ET CAPITANT n°s 28, 174; MATIENZO, *COMMENTARIA* (1597), transl. in ROBBINS, *COMMUNITY PROPERTY LAWS* 22-62 (1940) [hereinafter cited as MATIENZO with page reference to ROBBINS transl.]; 3 PLANIOL no. 901.

5. See 16 BAUDRY-LACANTINERIE n° 249; 3 COLIN ET CAPITANT n° 176; MCKAY, §§ 163, 166-170; 3 PLANIOL no. 905; 6 TOULLIER n° 82.

6. E.g., DAGGETT, *THE COMMUNITY PROPERTY SYSTEM OF LOUISIANA* 23, 209 (1945); Daggett, *Is Joint Control of Community Property Possible*, 10 *TUL. L. REV.* 589 (1936); Daggett, *Policy Questions on Marital Property Law in Louisiana*, 14 *LA. L. REV.* 528 (1954); Dunbar, *Income Taxation*, 5 *LOYOLA L.J.* 88, 90-92 (1924). See also DAGGETT, *THE COMMUNITY PROPERTY SYSTEM OF LOUISIANA* ch. 21 (1945) (concerning the related problem of the nature of the

legal entity,<sup>7</sup> a partnership,<sup>8</sup> and ownership in indivision,<sup>9</sup> these speculations have been largely piecemeal; consequently, no consistent or comprehensive theory has been developed. Likewise, the Louisiana Civil Code furnishes no immediate satisfaction for the curious mind. The writer, then, has little choice but to make his own inferences from the statutory and jurisprudential rules governing the community, and comparisons with other similar legal institutions, seeking guidance from the positions taken in France and Spain and from the underlying purposes of the community system. Discussion will focus on two theories which have been advanced in Louisiana, France, and Spain: the separate legal entity theory and the ownership in indivision theory. Brief consideration will also be given to the sense in which the community is a partnership.

It may legitimately be asked whether such a theoretical inquiry has, after all, sufficient practical importance to warrant concern: in view of the specific code provisions and jurisprudential rules governing community property, what difference does it make whether, in theory, the community is regarded in one light or another? The answer lies in the fact that Louisiana legislation on community property is incomplete and in many cases remains uncertain despite piecemeal amendment and extensive jurisprudential development. In seeking solutions for uncertain or unprovided cases, recourse to some fundamental theory might be useful in order to maintain a consistent legal pattern.<sup>10</sup> Unless the theory relied upon, whether it has been

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wife's interest in community property); Johnson, *Taxation of Community Property: The Wiener Case*, 18 TUL. L. REV. 525 (1944) (comparing the community to the common law joint tenancy, tenancy in common, and tenancy by the entirety).

7. *Demoruelle v. Allen*, 218 La. 603, 610-11, 50 So.2d 208, 210 (1950); *LeRosen v. North Cent. Texas Oil Co.*, 169 La. 973, 975, 126 So. 442, 443 (1930); *Succession of Ferguson*, 146 La. 1010, 1036-37, 84 So. 338, 347 (1920); *Childers v. Johnson*, 6 La. Ann. 634, 641 (1851).

8. *E.g.*, *Daigre v. Daigre*, 230 La. 472, 480-82, 89 So.2d 41, 44-45 (1956); *Demoruelle v. Allen*, 218 La. 603, 610-11, 50 So.2d 208, 210 (1950); *Succession of Wiener*, 203 La. 649, 667-69, 14 So.2d 475, 480-81 (1943); *Childers v. Johnson*, 6 La. Ann. 634, 641 (1851). See also *Henderson's Estate v. Commissioner*, 155 F.2d 310, 312 (5th Cir. 1946).

9. *E.g.*, *Azar v. Azar*, 239 La. 941, 120 So.2d 485 (1960); *Thigpen v. Thigpen*, 231 La. 206, 91 So.2d 121 (1956); *Messersmith v. Messersmith*, 239 La. 495, 86 So.2d 169 (1956); *Fazzio v. Krieger*, 226 La. 511, 76 So.2d 713 (1954); *Succession of Helis*, 226 La. 133, 75 So.2d 221 (1954); *Succession of Wiener*, 203 La. 649, 14 So.2d 475 (1943); *Phillips v. Phillips*, 160 La. 813, 107 So. 584 (1926); *Beatty v. Vining*, 147 So.2d 37 (La. App. 2d Cir. 1962); *Broussard v. Broussard*, 132 So.2d 85 (La. App. 3d Cir. 1961); *Succession of Johnson*, 8 So.2d 139 (La. App. Orl. Cir. 1942); *Smith v. Routon*, 181 So. 684 (La. App. 2d Cir. 1938).

10. Significantly, most judicial speculations as to the nature of the community

conceived uniquely in regard to the community or derived by analogy from some other legal institution, is consistent with the existing community property law and its underlying purposes, anomalous results may be reached. Hence, a theoretical inquiry into the nature of the community and the extent to which it may properly be compared to other superficially similar institutions takes on a genuine practical significance.

### THE COMMUNITY AS PARTNERSHIP

The section<sup>11</sup> of the Louisiana Civil Code containing the central provisions governing the legal community is entitled "Of Legal Partnership," and throughout that section the community is repeatedly referred to as a partnership.<sup>12</sup> This characterization, which was equally present in the Code of 1808,<sup>13</sup> probably had Spanish origin, rather than French. Such terminology was not present in the Code Napoleon,<sup>14</sup> and while the French writers speak of the community as a partnership and acknowledge certain similarities between the two, they reject any extensive analogy.<sup>15</sup> The early Spanish jurists, however, treated the community as a species of partnership created by operation of law, and turned to the law of partnership for solu-

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in Louisiana have arisen in cases for which neither the Civil Code nor prior cases provided a ready solution. *E.g.*, *Thigpen v. Thigpen*, 231 La. 206, 91 So.2d 12 (1956) (whether separated wife could sue husband for fraudulent sale of community property during marriage); *Daigre v. Daigre*, 230 La. 472, 89 So.2d 41 (1956) (whether divorced wife could effect piecemeal partition of community); *Demoruelle v. Allen*, 218 La. 603, 50 So.2d 208 (1950) (what venue rules applied to action for partition of community property); *Succession of Wiener*, 203 La. 694, 14 So.2d 475 (1943) (whether entire community could be taxed as part of deceased husband's estate); *Rhodes v. Rhodes*, 190 La. 370, 182 So. 541 (1938) (whether divorced wife could partition community property before settlement of community debts); *LeRosen v. North Cent. Texas Oil Co.*, 169 La. 973, 126 So. 442 (1930) (whether delay rental on community mineral lease granted by husband alone was properly paid to spouses' joint account); *Succession of Cason*, 32 La. Ann. 790 (1880); (whether widow's homestead could be claimed from community property in preference to community creditor); *Childers v. Johnson*, 6 La. Ann. 634 (1851) (whether wife should be charged for community's payment of her separate debt); *Squire v. Belden*, 2 La. 268 (1831) (whether husband and wife could contract commercial partnership during marriage); *Washington v. Palmer*, 28 So.2d 509 (La. App. 2d Cir. 1946) (whether divorced wife was necessary party to suit to revive judgment obtained during marriage on community debt).

11. Bk. III, tit. VI, ch. 3, § 1.

12. LA. CIVIL CODE arts. 2332, 2386, 2392, 2399, 2402, 2403, 2404, 2406, 2409, 2410, 2418, 2419, 2423, 2424 (1870).

13. See generally Code of 1808 provisions in 3 LOUISIANA LEGAL ARCHIVES, COMPILED EDITIONS OF THE CIVIL CODES OF LOUISIANA 1317-35 (1942).

14. See FRENCH CIVIL CODE arts. 1399-1495.

15. See, *e.g.*, BAUDRY-LACANTINERIE n° 246; 3 COLIN ET CAPITANT n° 28, 174; 3 PLANIOL nos. 903, 905; 6 TOULLIER n° 74-75.

tions to community property problems.<sup>16</sup> Possibly the 1808 redactors intended similar treatment. However, the redactors of the Code of 1825 added a new provision,<sup>17</sup> now article 2807 of the Code of 1870, providing: "The community of property, created by marriage is not a partnership; it is the effect of a contract governed by rules prescribed for that purpose in this Code." This article, found among the provisions on conventional partnership, was apparently intended to emphasize the fact that the community is created by operation of law as an effect of the contract of marriage and, further, to preclude direct application of the provisions governing conventional partnerships to the marital community.<sup>18</sup> Consequently, the legal community in Louisiana can be regarded only as a unique type of partnership governed by its own particular rules. For this reason, plus the fact that comparisons between the community and the conventional partnership are available elsewhere,<sup>19</sup> no further treatment of this subject will be presently attempted. More significant is the question whether the unique marital partnership is a separate legal entity or constitutes a form of co-ownership in indivision between the spouses.

### THE SEPARATE ENTITY THEORY

The hypothesis for discussion is that the legal community, in one sense of the term,<sup>20</sup> is a legal entity, as is the civilian part-

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16. See AZEVEDO 140, 149, 156, 196; GUTIERREZ, *PRACTICARUM QUESTIONUM CIRCA LEGES REGIAS HISPANIAE* (1606), transl. in ROBBINS, *COMMUNITY PROPERTY LAWS* 148, 216, 226-27, 232 (1940) [hereinafter cited as GUTIERREZ with page reference to ROBBINS transl.]; MATIENZO 22-62. Application of partnership rules to the community is specifically authorized by modern Spanish law. *SPANISH CIVIL CODE* art. 1395.

17. *La. Civil Code* art. 2778 (1825).

18. Article 2807 has frequently been relied upon to avoid application of partnership rules to community property situations. See *Mackenroth v. Pelke*, 171 La. 842, 132 So. 365 (1931); *Bartoli v. Huguenard*, 39 La. Ann. 412, 2 So. 196 (1887); *Succession of Boyer*, 36 La. Ann. 506 (1884); *Succession of Cason*, 32 La. Ann. 790 (1880); *Baird v. Lemee*, 23 La. Ann. 424 (1871). In other cases it has been ignored when the court drew on partnership principles by analogy. See *Daigre v. Daigre*, 89 So. 2d 41, 230 La. 472 (1956); *Demoruelle v. Allen*, 218 La. 603, 50 So. 2d 208 (1950); *Succession of Wiener*, 203 La. 649, 14 So. 2d 475 (1943); *Childers v. Johnson*, 6 La. Ann. 634 (1851). However, in none of these cases were the partnership principles applied inconsistent with community property law.

19. See generally authorities cited in notes 4, 6 *supra*.

20. The term "community" has apparently been used to denote (1) the community assets, see *e.g.*, *LA. CIVIL CODE* arts. 2402, 2406, 2410 (1870); (2) the aggregate of the two spouses, see 3 *PLANIOL* no. 902; (3) the marital partnership as a legal institution and the rules governing it, see *LA. CIVIL CODE* arts. 2332, 2399, 2401 (1870); (4) a separate legal entity, see cases cited notes 43, 44, 57 *infra*.

nership,<sup>21</sup> separate and distinct from the spouses, created by operation of law, and clothed with the attributes of a juridical person. This fictional person, acting through its agents,<sup>22</sup> would be capable of acquiring legal rights and duties; more specifically, it would own all community property and be the obligor of all community debts. In strict theory, the spouses would not own any particular community assets, but would have only a residuary interest, comparable to that of a partner,<sup>23</sup> and would be entitled only to what remained of the community assets after satisfaction of community debts upon termination and liquidation of the community. Furthermore, it appears that neither the spouses personally nor their separate property would be liable for community debts during the marriage.<sup>24</sup> Finally, neither the com-

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21. See 3 PLANIOL nos. 3029, 3040. Formerly, the French civil partnership (*société civile*) was not considered as having legal personality as was the commercial partnership. However, by 1894 the Cour de Cassation had attributed full legal personality to both. *Id.* no. 3029. In Louisiana all partnerships are considered separate legal entities with legal personality. *Trappey v. Lumbermen's Mut. Cas. Co.*, 229 La. 632, 86 So.2d 515 (1956); *Brinson v. Monroe Auto. & Supply Co.*, 180 La. 1064, 158 So. 558 (1934); *Dardin v. Garrett*, 130 La. 998, 58 So. 857 (1912); *Succession of Pilcher*, 39 La. Ann. 362, 1 So. 929 (1887); *Smith v. McMicken*, 3 La. Ann. 319 (1848). However, the separate entity theory has not been consistently applied to partnerships and has been extensively criticized. O'Neal, *An Appraisal of the Louisiana Law of Partnerships (Part II)*, 9 LA. L. REV. 450-72 (1949).

22. The husband, of course, would be regarded as the prime agent and manager under LA. CIVIL CODE art. 2404 (1870). The wife could also act as agent when authorized by the husband; this possibility is consistent with present law. See LA. CIVIL CODE art. 1787 (1870); LA. CODE OF CIVIL PROCEDURE art. 695 (1960).

23. See, e.g., *Smith v. McMicken*, 3 La. Ann. 319 (1848): "The partnership once formed and put into action, becomes, in contemplation of law, a moral being, distinct from the persons who compose it. . . . Hence, therefore, the partners are not the owners of the partnership property. The ideal being thus recognized by a fiction of law, is the owner . . . and the respective parties, who associated themselves for the purposes of participating in the profits which may accrue, are not the owners of the property itself, but of the residuum which may be left from the entire partnership property, after the obligations of the partnership are discharged." *Accord*, Louisiana cases cited note 21 *supra*. The interest of a partner before dissolution of the partnership is characterized as an incorporeal right. See LA. CIVIL CODE arts. 460, 470, 474 (1870); *Sugar v. Collector*, 243 La. 217, 142 So.2d 401 (1962).

24. Though an analogous result should obtain under a strict application of the separate entity theory to partnerships, such is not the case in Louisiana; partners may be sued jointly on a partnership debt. LA. CODE OF CIVIL PROCEDURE art. 737 (1960), and judgment may be rendered against a commercial partnership and its partners in solido. LA. CIVIL CODE art. 2872 (1870); *First Nat. Bank v. Knighton Bros.*, 16 La. App. 407, 134 So. 706 (2d Cir. 1931); *Bell v. Massey & Poultney*, 14 La. Ann. 831 (1859). In an ordinary partnership the partners are only jointly liable for partnership debts. LA. CIVIL CODE art. 2873 (1870); *National Oil Works v. Korn Bros.*, 164 La. 800, 114 So. 659 (1927). In Alabama, however, the separate entity theory is strictly applied; a judgment on a partnership debt affects only the partnership entity and its property. *Ratchford v. Covington County Stock Co.*, 172 Ala. 461, 55 So. 806 (1911).

munity nor its assets would be liable for the separate debts of the spouses.<sup>25</sup>

At the outset, it must be admitted that authority for this theory is somewhat weak. Although it has been advanced at times in other community property jurisdictions,<sup>26</sup> the most prominent authorities in France and Spain have rejected it.<sup>27</sup> In Louisiana there is no specific statutory authority for the doctrine, and as later discussion will reveal,<sup>28</sup> it is inconsistent with some aspects of jurisprudential community property law. Surprisingly, however, the Louisiana courts have approved the theory on several occasions.<sup>29</sup> Consequently, a careful evaluation of it is in order.

### *Pertinent Statutory Provisions*

Louisiana legislation contains no direct authority either for or against the separate entity theory. Furthermore, only weak and conflicting inferences can be made from extant community property provisions. For example, Civil Code article 2403,<sup>30</sup> providing that debts contracted during the marriage are to be satisfied out of community funds, while prior debts of both spouses are exigible only from their separate property, seems consistent with the separate entity theory. However, it is not a necessary conclusion from this rule that the community is a fic-

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25. An analogous result is reached in Louisiana partnership law on the basis of the separate entity theory. *City of New Orleans v. Gauthraux*, 32 La. Ann. 1126 (1880); *Levy & Sugar v. Cowan & Mayo*, 27 La. Ann. 556 (1875); *Smith v. McMicken*, 3 La. Ann. 319 (1848). However, a partner's individual creditor can seize the partner's residuary interest and thus effect a dissolution of the partnership. *Toelke v. Toelke*, 153 La. 697, 704, 96 So. 536, 539 (1923) and cases there cited. See note 77 *infra*.

26. See DURANTON, *COURS DE DROIT CIVIL FRANCAIS* n° 96, 102 (4th ed. 1834); MCKAY §§ 163, 166-70; 20 TROPLONG, *DROIT CIVIL* n° 306-322 (1850).

27. French authorities: 8 AUBRY ET RAU n° 505; 16 BAUDRY-LACANTINERIE n° 249; 3 COLIN ET CAPITANT n° 176; 3 PLANTOL no. 905; 6 TOULLIER no. 82. Spanish authorities: see Berdejo, *En Torno a la Naturaleza Juridica de la Comunidad de Gananciales delCodigo Civil*, 187 REVISTA GENERAL DE LEGISLACION Y JURISPRUDENCIA 7 (1950) and authorities there cited.

28. See text accompanying notes 58-66, 87-91 *infra*.

29. *Demoruelle v. Allen*, 218 La. 603, 610-11, 50 So.2d 208, 210 (1950); *LeRosen v. North Cent. Texas Oil Co.*, 169 La. 973, 975, 126 So. 442, 443 (1950); *Succession of Ferguson*, 146 La. 1010, 1036-37, 84 So. 338, 347 (1920); *Childers v. Johnson*, 6 La. Ann. 634, 641 (1851); *Bailey v. Alice C. Plantation & Refinery, Inc.*, 152 So.2d 336, 340 (La. App. 1st Cir. 1964).

30. LA. CIVIL CODE art. 2403 (1870): "In the same manner, the debts contracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund, whilst the debts of both husband and wife, anterior to the marriage, must be acquitted out of their own personal and individual effects."

titious being personally liable for community debts. An equally plausible explanation is that article 2403 merely contemplates a method of accounting under which debts and assets are distinguished according to their classification as either community or separate. Furthermore, in spite of article 2403, the jurisprudence has largely repudiated the notion that in claims by creditors the husband's separate estate is to be divorced from the community.<sup>31</sup>

Again, the rule that "*at the time of dissolution of the marriage, all effects which both husband and wife reciprocally possess, are presumed common effects,*"<sup>32</sup> and only then are divided equally between the spouses,<sup>33</sup> might seem to support the proposition that during the marriage community assets are owned by a separate entity, the spouses only having an expectancy materializing at dissolution of the community. On the other hand, it seems equally plausible that these provisions relate only to the mechanics of classifying and partitioning the community property, which the spouses themselves owned in indivision during the marriage.<sup>34</sup>

Finally, from the fact that the community is repeatedly referred to as a "partnership,"<sup>35</sup> coupled with the Louisiana rule that a partnership is regarded as a fictitious legal person,<sup>36</sup> it might be concluded the same is true of the community. This argument, however, if premised on the assumption that conventional partnership rules are directly applicable to the community, is invalidated by Civil Code article 2807, which apparently precludes such application.<sup>37</sup> Even if, in spite of article 2807, the redactors intended certain analogies with conventional partnerships, they may well have contemplated analogy with the French civil (as opposed to commercial) partnership, which until the 1890's was held not to possess juridical personality.<sup>38</sup>

The Code of Civil Procedure is equally ambiguous in its treatment of the community. While it provides that a partnership

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31. See notes 64-66 *infra* and accompanying text.

32. LA. CIVIL CODE art. 2405 (1870).

33. *Id.* art. 2406.

34. This view is supported by recent jurisprudence holding the spouses owners in indivision of community property during the marriage. See cases cited note 9 *supra*.

35. LA. CIVIL CODE arts. 2332, 2386, 2392, 2399, 2402, 2403, 2404, 2406, 2409, 2410, 2418, 2419, 2423, 2424 (1870).

36. See cases cited note 21 *supra*.

37. See text accompanying notes 17-18 *supra*.

38. See note 21 *supra*.



has capacity to sue and be sued in its own name, appearing through an authorized partner,<sup>39</sup> no such provision is made for the community. Article 686 provides that "the husband is the *proper plaintiff*, during the existence of the marital community, to sue to enforce a *right of the community*."<sup>40</sup> (Emphasis added.) Does the husband appear in his own right or as a representative of the community entity? Should the phrase "right of the community" be taken with its literal connotation that the right belongs to the community as a separate legal entity? Article 735 is similarly ambiguous: "The husband is the *proper defendant* in an action to enforce an obligation *against the marital community*."<sup>41</sup> (Emphasis added.) Does the article contemplate an action against a community entity through the husband as agent, or an action against the husband personally, or both? The jurisprudential rule, criticized hereafter, that the husband is personally liable for community debts<sup>42</sup> indicates that at least an action against the husband personally is intended, but article 735 itself remains unclear.

*Direct Jurisprudential Authority —  
Usefulness of the Theory as an Analytical Tool*

Despite the repudiation of the separate legal entity theory in France and Spain and the lack of statutory authority, language in numerous Louisiana court decisions implies contemplation of the community as a distinct fictitious person.<sup>43</sup> Moreover, the Louisiana courts have affirmed the doctrine in at least five decisions.<sup>44</sup> Two of the more recent of these deserve no discussion

39. LA. CODE OF CIVIL PROCEDURE arts. 688, 737 (1960).

40. *Id.* art. 686. The wife may sue to enforce a community right when specifically authorized by the husband, *id.* art. 695, and may sue with the husband as plaintiff in the alternative if the classification of the right as community or the wife's is uncertain. *Id.* art. 686.

41. *Id.* art. 735. If there is doubt whether the obligation sued on belongs to the community or to the wife's separate estate, the husband and wife may sue in the alternative. *Ibid.*

42. See note 64 *infra* and accompanying text.

43. See, e.g., *Tomme v. Tomme*, 174 La. 123, 128, 139 So. 901, 903 (1932) (*both* spouses have only residuary interest in community assets during marriage); *Pedlahore v. Pedlahore*, 151 La. 288, 293, 91 So. 738, 740 (1922) (ambiguous indication community property owned by separate entity); *Wilson & Gandy, Inc. v. Cummings*, 150 So. 436, 437-38 (La. App. 2d Cir. 1933) (community apparently considered third person in relation to wife). See also cases cited note 57 *infra* and accompanying text.

44. *Demoruelle v. Allen*, 218 La. 603, 50 So. 2d 208 (1950); *LeRosen v. North Cent. Texas Oil Co.*, 169 La. 973, 126 So. 442 (1930); *Succession of Ferguson*, 146 La. 1010, 84 So. 338 (1920); *Childers v. Johnson*, 6 La. Ann. 634 (1851); *Bailey v. Alice C. Plantation & Refinery, Inc.*, 152 So. 2d 336 (La. App. 1st Cir. 1963).

because their characterizations of the community as a separate entity were only by way of dictum and neither case dealt with substantive community property law.<sup>45</sup> The other decisions, however, are of greater interest. The first was *Childers v. Johnson*,<sup>46</sup> in which a wife's suit for separation of property was opposed by intervening community creditors. The trial court had denied the creditors' demand that the wife reimburse the community for the husband's payment of the wife's prenuptial debt with community funds. On this point the Supreme Court reversed, arguing as follows: "[The error of the lower court] arises from not distinguishing the community, the conjugal partnership, from the persons who compose it. The partnership, the intervenors, who are creditors of the community, have a right to consider as a legal entity; like other partnerships, it must be contemplated as an ideal being, *être moral*, distinct from the members who compose it, having its rights and its obligations, its assets and its liabilities, its debtors and its creditors. Mrs. Patton is not the debtor of her husband for the \$2000 expended for her benefit. She is the debtor of the community."<sup>47</sup> The court went on to apply the general rule of partnership law that a partner must account to the partnership for the use of its funds for his own personal advantage, and clinched its conclusion with the remark that reimbursement by the wife would be consistent with what is now Civil Code article 2403.<sup>48</sup> Reliance on the latter provision would seem to have sufficed, without vesting the community with legal personality. It must be admitted, however, that analytically speaking, the separate entity concept served to clarify the respective rights and obligations of the parties.

The next application of the separate entity doctrine, in *Succession of Ferguson*,<sup>49</sup> had a much more crucial bearing on the outcome of the litigation. There the surviving widow in community, who was also entitled to inherit the husband's half of the

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45. *Demoruelle v. Allen*, 218 La. 603, 50 So. 2d 208 (1950) (venue for action for partition of community property); *LeRosen v. North Cent. Texas Oil Co.*, 169 La. 973, 126 So. 442 (1930) (whether delay rental on community mineral lease was properly paid to spouses' joint account).

46. 6 La. Ann. 634 (1851).

47. *Id.* at 641.

48. *Ibid.*; LA. CIVIL CODE art. 2403 (1870), quoted in note 30 *supra*. Article 2372 of the Code of 1825, applied in *Childers*, is identical with the present article 2403. See 3 LOUISIANA LEGAL ARCHIVES, COMPILED EDITIONS OF THE CIVIL CODES OF LOUISIANA 1320 (1942).

49. 146 La. 1010, 84 So. 338 (1920).

community under Civil Code article 915, claimed from the husband's separate estate a sum equal to the *entire* enhanced value of his separate property due to improvements made with community funds. Her claim was opposed by the husband's collateral relations, who argued that under article 2408 the widow was entitled only to one half the amount demanded. Article 2408 provides: "When the separate property of either the husband or the wife has been increased or improved during the marriage, *the other spouse . . .* shall be entitled to the reward of *one half* of the value of the increase or ameliorations, if it be proved that the increase or ameliorations be the result of common labor, expenses or industry."<sup>50</sup> On its face, the article appears only to give the individual spouse a right to recover the prescribed amount from the other's estate, vesting no right in the community *per se*. Under this interpretation, the wife's inheritance of the husband's share of the community in *Ferguson* would not support her claim for the *entire* enhanced value of the property in question. The Supreme Court, however, rejected this view and upheld the wife's claim. Relying on *Childers v. Johnson* for the proposition that the community is an ideal being with its own rights and obligations, the court concluded the husband's separate estate had become indebted to the community for the entire amount, and that the wife acquired half the community right as surviving spouse in community and the other half by inheritance under article 915.<sup>51</sup> The right granted in article 2408, then, is one in favor of a spouse, not in his individual capacity, but as partner in the community. Conceptually, this is appropriate, since the right arises from "common labor, expenses or industry."<sup>52</sup> Further, it seems plausible that in draft-

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50. LA. CIVIL CODE art. 2408 (1870).

51. 146 La. 1010, 1036-37, 84 So. 338, 347 (1920): "Whilst therefore opponent, if she were here claiming only the half interest in the community property to which she is entitled in her own right, could recover, under C.C. art. 2408, only 'one half' of the enhanced value of the separate estate of the decedent, resulting from the improvement, her right of recovery, as the matter stands, extends to the whole amount of that value, since the separate estate was indebted to the community for the whole amount, and . . . she is entitled to all the debts due the community . . .; for in dealing with the question here presented, the community (using the language of the court in *Childers v. Johnson*, 6 La. Ann. 641) is 'an ideal being, distinct from the spouses who compose it, having its rights and obligations, its assets and liabilities, its debtors and its creditors,' and the right which the decedent, had as a partner in the community, against his own separate estate, to one-half the debt, due by that estate to the community, he might have disposed of by his will, . . . and in default of such disposition, and of ascendants or descendants, that asset devolved on his widow as the legal heir of his undisposed share of the community property."

52. LA. CIVIL CODE art. 2408 (1870).

ing article 2408 in terms of the amount due an individual spouse the redactors only intended to prescribe the practical result which should normally obtain as between the spouses when the community is settled. In the simplest situations it would make no difference, as a practical matter, which of the two suggested interpretations of article 2408 were adopted. This fact is easily seen, for example, if the community is dissolved by divorce, or by the death of either spouse under circumstances in which the other would not inherit under article 915.<sup>53</sup> The necessity for choosing between the two interpretations only arises because in some cases, as in *Ferguson*, it is essential to distinguish the community from the separate estates of the spouses. Another such occasion would arise if on dissolution of the community a community creditor, finding his claim could not otherwise be satisfied, demanded that one of the spouses pay the community the entire increased value of that spouse's separate property due to improvements made with community funds. The creditor's claim would be justified only under the *Ferguson* view that the right created by article 2408 is really a community right.

In *Bailey v. Alice C. Plantation & Refinery, Inc.*,<sup>54</sup> the most recent authority for the separate entity doctrine, the court was again faced with a problem calling for a distinct separation of the community estate from the separate patrimony of a spouse. It was contended that compensation had occurred between a debt owed to the community by a third person and one owed to the latter by the wife in her separate capacity. The court rejected this contention because for compensation to operate there must be a mutuality of indebtednesses, while in the present case there was none since the wife's "separate estate and the community were different legal entities — two different persons."<sup>55</sup> Actual-

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53. In these situations, the community assets, including an article 2408 claim, would be divided equally between the spouses or their heirs and would be subject to the same rules of intestate succession as the spouses' separate property. The spouse (or his heirs) whose property had been improved with community funds would, of course, have no claim since the property with the improvements belonged exclusively to him. The other spouse, acquiring only half the community claim, could recover only half the enhanced value. Obviously, the same result would accrue if article 2408 were interpreted to create a separate, rather than a community, right.

54. 152 So. 2d 336 (La. App. 1st Cir. 1963). For a more complete discussion of the case see Note, 24 LA. L. REV. 648 (1964).

55. 152 So. 2d 336, 340 (La. App. 1st Cir. 1963). Interestingly, through application of the separate entity theory, the Louisiana courts have held that a partner's individual debts are not compensable against debts owed to the partnership. *E.g.*, *Atkinson & Co. v. Hibernia Nat'l Bank*, 186 La. 1074, 173 So. 768

ly, the same result could have been reached without resort to the separate entity theory by arguing that to allow compensation by operation of law in such a case would be inconsistent with the well-established rule that community property is not liable for the wife's separate debts during the marriage.<sup>56</sup> However, as in *Childers* and *Ferguson*, envisioning the community as a distinct legal person presented a clear picture of the legal relations of the parties as an analytical framework.

Possibly, in none of the situations discussed above was the notion that the community is a separate juridical person essential to achieve the proper result. Similar conclusions could be reached either by reasoning from other existing rules or by merely conceiving distinct separate and community patrimonies, together with a special accounting system for each, under which rights and obligations are allocated to one patrimony or another according to the rules established for classification of property during the marriage. However, the separate entity theory lends clarity to one's visualization of the relations among the individual spouse, his separate estate, the community assets and liabilities, and third persons, in terms of an analysis of legal rights and obligations. Not least of all, it renders more plausible the natural tendency to speak of the community in personal terms — as acquiring and owning property, and having legal rights and obligations.<sup>57</sup> Nevertheless, it would be premature to approve the doctrine on the foregoing considerations without a broader analysis of its consistency with the purposes of a community system and possible conflicts with other community property law in areas where its ramifications would be greatest.

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(1937); *Key v. Box*, 14 La. Ann. 497 (1859); *Smith v. McMicken*, 3 La. Ann. 319 (1848); *Dick v. Byrne*, 7 Rob. 465 (La. 1844).

56. See note 63 *infra* and accompanying text. An interesting question is whether compensation would operate between the husband's separate debt and a debt owed to the community. A strict application of the separate entity theory would dictate a negative reply. *But see* notes 136-138 *infra* and accompanying text.

57. Manifestations of this tendency in the language of the French Civil Code have been noticed. See 8 AUBREY ET RAU n° 249. It is reflected in the language of numerous Louisiana court decisions. *E.g.*, *Thompson v. Waterhouse*, 157 So. 2d 300, 301 (La. App. 4th Cir. 1963) ("Irrespective of the fact that the community owned the business" (Emphasis added.)); *Keyser v. James*, 153 So. 2d 97, 99 (La. App. 1st Cir. 1963) ("the law presumes an agency relationship between the community as principal and the wife as agent"); *Denegre v. Denegre*, 30 La. Ann. 275, 277 (1878) ("the community . . . is indebted"). See also *Peters v. Klein*, 161 La. 664, 667, 109 So. 349, 350 (1926); *Sharp v. Zeller*, 110 La. 61, 72, 34 So. 129, 134 (1902); *Succession of Merrick*, 35 La. Ann. 296, 297 (1883); *Durham v. Williams*, 32 La. Ann. 162, 163 (1880).

*Creditors' Rights and the Purposes of the Community*

Under a strict application of the separate entity theory the community as a legal personality would be liable for all community debts so long as the marriage subsisted.<sup>58</sup> Likewise, it would follow logically that community debts should be satisfied only out of community property and the spouses separate debts should be satisfied only out of their separate property.<sup>59</sup> Although Civil Code article 2403 appears to embody such a scheme,<sup>60</sup> the jurisprudence has recognized it only to keep the wife's property wholly separate from the community's. The wife is not liable for community debts during the marriage;<sup>61</sup> nor can her separate property be seized to satisfy such debts.<sup>62</sup> Likewise, the wife's individual creditors cannot enforce their rights against community property during the marriage.<sup>63</sup> The opposite is true of the husband. He is personally liable for the whole of all community debts,<sup>64</sup> his property is subject to seizure by community creditors,<sup>65</sup> and his individual creditors can enforce their claims against community property.<sup>66</sup> In effect, as to creditors, the community assets and debts are merged with the husband's. So long as the law remains in this posture the separate entity the-

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58. See *Childers v. Johnson*, 6 La. Ann. 634, 641 (1851); 16 BAUDRY-LACANTINERIE n° 249-250; 3 COLIN ET CAPITANT n° 176.

59. See BAUDRY-LACANTINERIE n° 249-250.

60. See note 30 *supra*.

61. See, e.g., *Personal Fin., Inc. v. Simms*, 148 So. 2d 176 (La. App. 1st Cir. 1962); *Smith v. Viser*, 117 So. 2d 673 (La. App. 2d Cir. 1960); *Blackshear v. Landry*, 46 So. 2d 688 (La. App. Orl. Cir. 1950).

62. See cases cited note 61 *supra*.

63. See, e.g., *Schaeffer v. Trascher*, 165 La. 315, 115 So. 575 (1928); *Keyser v. James*, 153 So. 2d 97 (La. App. 1st Cir. 1963); *Demack Motors Co. v. Hallick*, 119 So. 572 (La. App. Orl. Cir. 1929).

64. *Grandeson v. International Harvester Credit Corp.*, 223 La. 504, 66 So. 2d 317 (1953); *Poindexter v. Louisiana & A. Ry.*, 170 La. 521, 128 So. 297 (1930); *Luther v. Werlein*, 163 La. 752, 112 So. 709 (1927); *Breaux v. Decuir*, 49 So. 2d 495 (La. App. 1st Cir. 1950); *Beal v. Ward*, 127 So. 423 (La. App. Orl. Cir. 1930).

65. *Poindexter v. Louisiana & A. Ry.*, 170 La. 521, 128 So. 297 (1930); *Gosserand v. Monteleone*, 164 La. 397, 113 So. 889 (1927); *Miguez v. Delcambre*, 125 La. 176, 51 So. 108 (1910); *Hawley v. Crescent City Bank*, 26 La. Ann. 230 (1874).

66. *Hawley v. Crescent City Bank*, 26 La. Ann. 230 (1874); *Davis v. Compton*, 13 La. Ann. 396 (1858); *Stafford v. Sumrall*, 21 So. 2d 83 (La. App. 1st Cir. 1945); *First Nat'l Bank v. Coreil*, 145 So. 395 (La. App. 1st Cir. 1933). In *Succession of Cason*, 32 La. Ann. 790 (1880) a wife's claim against her husband's estate for the widow's homestead was held exigible from community assets in preference to community creditors, the court apparently rejecting the separate entity doctrine. Dictum in a recent case indicates separate creditors of the husband may be limited to the husband's half interest in the community. See *Fazzio v. Krieger*, 226 La. 511, 524, 76 So. 2d 713, 714 (1954); *Comment*, 25 LA. L. REV. 201, 229-30 (1964).

ory obviously cannot be consistently applied in Louisiana. The ultimate question, however, should be which of these opposing schemes is most consistent with the underlying purposes of the community, the realities of the marital relationship, and a balancing of equities between the spouses and third persons.

French authorities have rejected the separate entity theory on the basis that it is inconsistent with the nature of the conjugal relationship and the purposes of the community system.<sup>67</sup> A typical argument<sup>68</sup> proceeds as follows: A separate legal personality generally arises in relation to a collective interest which it is desirable to separate from the individual interests of the associates; for example, a commercial partnership or corporation. The marital community, however, is intimately related to the personal lives of the spouses, its goal being not to make commercial gain, but to support the family and foster family unity. The introduction of a separate juridical person would import a germ of disassociation in the family unit rather than promote the cohesion that the community regime is designed to assure. The writers then specifically point out that the separate entity theory would be inconsistent with the traditional French rule, similar to that in Louisiana, that in claims by creditors the community assets and liabilities are not distinguished from those of the husband.<sup>69</sup>

This reasoning on its face appears both overly abstract and superficial. Surely, the mere introduction of a fictitious entity between the spouses, without more, would lead only to a fictitious estrangement. Furthermore, neither the fact that the principal goal of the community is non-commercial, nor the truism that the community is bound up with the personal lives of the spouses necessarily implies that the community assets and obligations should not be separated from those of the spouses as individuals. The French authorities apparently assume that the existing rules merging the community with the husband's separate estate are consistent with community purposes, whereas the opposite results following from the separate entity theory are not. On the contrary, the reverse might well be true in many cases. If the main purpose of the community is to provide support

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67. See 8 AUBRY ET RAU n° 505; 16 BAUDRY-LACANTINERIE n° 249; 3 COLIN ET CAPITANT n° 176; 3 PLANIOL no. 905.

68. The example elaborated is from 3 COLIN ET CAPITANT n° 176.

69. *Ibid.* See also authorities cited note 67 *supra*.

for the family, it would seem desirable to protect the common assets from seizure by the individual creditors of the husband, limiting their use to the satisfaction of debts contracted in the collective interests of the family. From the point of view of marital harmony, as well as protection of the wife's interest in community property, it hardly seems reasonable to permit the wife's entitlement to her share of the community to be drained by payment of separate debts unwisely contracted by the husband. It likewise appears inequitable to hold the husband and his separate estate liable for the full amount of community debts, especially when they have been contracted by the wife.<sup>70</sup> Finally, treatment of the community as part of the husband's patrimony probably originated in the old idea that the husband was the sole owner of the community assets,<sup>71</sup> a doctrine which not only appears inconsistent with the modern position of the wife as a frequent contributor to the community, with increased prominence in the marital relationship and relieved of her former legal incapacities,<sup>72</sup> but also has been rejected in both France<sup>73</sup> and Louisiana.<sup>74</sup> In short, one must look beyond the nature and purposes of the community to justify a rejection of the separate entity theory in favor of the present scheme.

Perpetuation of the "merger" doctrine can best be justified on the basis that creditors' interests demand a balancing of equities in their favor.<sup>75</sup> Under the separate entity theory a creditor

70. See Comment, 25 LA. L. REV. 201, 219 (1964).

71. See, e.g., POTHIER, TRAITÉ DE LA COMMUNAUTÉ n° 3 (1861 ed.); 6 TOULLIER n° 75-76; FEBRERO, quoted in McKAY § 1104; Comment, 25 LA. L. REV. 201, 215-19, 228-33 (1964). There are indications that this view was once accepted in Louisiana. See La. Civil Code p. 336, art. 66 (1808), which provided that the husband could alienate community property during the marriage without the wife's consent, "because she has no sort of right in them until her husband be dead." See also Succession of Boyer, 36 La. Ann. 506 (1884); Succession of Cason, 32 La. Ann. 790 (1880); City Ins. Co. v. Lizzie Simmons, 19 La. Ann. 249 (1867); Guice v. Lawrence, 2 La. Ann. 226 (1847); Prudhomme v. Edens, 6 Rob. 64 (La. 1843); McDonough v. Tegre, 7 Mart. (N.S.) 68 (La. 1828). The cases holding the wife has no vested interest in community property during the marriage, but a mere expectancy, imply that the husband was the sole owner. E.g., Ramsey v. Beck, 151 La. 190, 91 So. 426 (1922); Succession of McCloskey, 144 La. 438, 80 So. 650 (1919); Succession of Dumestre, 42 La. Ann. 411 (1890); McCaffrey v. Benson, 40 La. Ann. 10 (1888); Succession of Cason, 32 La. Ann. 790 (1880); Davis v. Compton, 13 La. Ann. 396 (1858).

72. See note 102 *infra* and accompanying text.

73. 8 AUBRY ET RAU n° 505; 16 BAUDRY-LACANTINERIE n° 247, 249; 3 PLANIOL nos. 903, 905. Cf. 3 COLIN ET CAPITANT n° 168, 173-177.

74. The predominant view in Louisiana today is that husband and wife are co-owners of community property during the marriage. See notes 90-91 *infra* and accompanying text.

75. The pros and cons of the present rule are discussed in Comment, 25 LA. L. REV. 201, 214-19, 228-33 (1964).



seeking his due from either the husband individually or from the community would be obliged to determine the proper classification (community or separate) of both the debt and the property available for satisfying it.<sup>76</sup> Further, the separate entity doctrine would cause a separate creditor of the husband to postpone satisfaction of his rights until dissolution of the marriage, if the husband had no separate property.<sup>77</sup> Practically, such a claim would often be illusory without revision of the present liberative prescription laws relating to debts. The foregoing problems are largely obviated by the present jurisprudence making both the husband and his separate property liable for community debts and allowing his separate creditors to be satisfied out of community assets.

A further consideration to be weighed is that under present law much of the potential inequity of the "merger" doctrine is eliminated by reimbursements between the husband and wife (or their estates) at termination of the community.<sup>78</sup> The husband may claim reimbursement from the community of half the amount of a community debt satisfied from his separate estate,<sup>79</sup> and the wife, as partner in the community, has like relief from the husband's estate for satisfaction of the husband's separate debts out of community assets.<sup>80</sup> In theory, then, the "merger" doctrine only applies to claims by creditors, while as between the spouses the respective assets and liabilities of the community and the spouses are distinguished through an accounting fictionally maintained during marriage and rendered at its dissolution.<sup>81</sup> This system, however, only partially mitigates the inequi-

76. The proper classification of both debts and assets is often a subtle question. See Comments, 25 LA. L. REV. 201-14 (1964), 25 LA. L. REV. 95 (1964), 25 LA. L. REV. 108 (1964).

77. Under Louisiana partnership law a partner's separate creditor can seize and sell the partner's intangible, residuary interest in the partnership, the result being a dissolution of the partnership. LA. CIVIL CODE art. 2823 (1870); Toelke v. Toelke, 153 La. 679, 96 So. 536 (1923), and cases cited therein. Such seizure and sale of a spouse's interest in the community, if the separate entity theory were accepted, seems prohibited, since it would either dissolve the community or create a new one between the remaining spouse and a third person. The latter result would be absurd and both would conflict with LA. CIVIL CODE art. 1991 (1870), which provides a creditor cannot require a separation of property between spouses.

78. See generally Huie, *Separate Claims to Reimbursement from Community Property in Louisiana*, 27 TUL. L. REV. 143 (1953).

79. See, e.g., *Peters v. Klein*, 161 La. 664, 109 So. 349 (1926); *Sharp v. Zeller*, 110 La. 61, 34 So. 129 (1902); *Denegre v. Denegre*, 30 La. Ann. 275 (1878); *Pennison v. Pennison*, 157 So. 2d 628 (La. App. 4th Cir. 1963).

80. See, e.g., *Jefferson v. Stringfellow*, 148 La. 223, 86 So. 774 (1920); *Succession of Moseman*, 38 La. Ann. 219 (1886); *Harris v. Harris*, 160 So. 2d 359 (La. App. 1st Cir. 1964).

81. See Huie, *Separate Claims to Reimbursement from Community Property*

ties of the "merger" doctrine, for two reasons: reimbursement claims are often extremely difficult to establish;<sup>82</sup> and, obviously, their satisfaction depends upon the solvency of the community or the debtor-spouse's estate, as the case may be.

The ranking of creditor's claims in settlement of the community is also pertinent to the separate entity theory. In France one reason given for rejection of the theory is its inconsistency with the French rule, apparently an extension of the "merger" doctrine, that on dissolution of the community all creditors, whether community or separate, are satisfied concurrently: no priority is given to community creditors against community property.<sup>83</sup> The separate entity theory would require such a priority.<sup>84</sup> In Louisiana, on the other hand, community creditors are preferred to separate creditors against community property.<sup>85</sup> Apparently, a separate creditor may only proceed against a spouse's share of the community remaining after satisfaction of community debts.<sup>86</sup> The Louisiana rule, which seems more equitable both between creditors and between spouses, makes the separate entity theory more acceptable here than in France.

In summary, the separate entity theory could not consistently be applied without modifying the present law governing the rights of creditors during the marriage. If these present rules are to be maintained, the community should not be characterized as a separate entity: only confusion would result from vesting the community with legal personality in situations such as those exemplified by the *Childers* and *Ferguson* cases, but not doing so in others. On the other hand, the separate entity theory is argu-

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in *Louisiana*, 27 TUL. L. REV. 143 (1953).

82. *Ibid.*

83. 8 AUBRY ET RAU n° 505; 16 BAUDRY-LACANTINERIE n° 250; 3 COLIN ET CAPITANT n° 176; 3 PLANIOL no. 901.

84. See note 83 *supra*. On the basis of LA. CIVIL CODE art. 2823 (1870) and the rule that a partnership is a separate legal entity, it is well settled in Louisiana that on dissolution of a partnership its creditors are preferred over the individual creditors of the partners. *Johnson v. Johnson*, 235 La. 226, 103 So. 2d 263 (1958); *Posner v. Little Pine Lumber Co.*, 157 La. 73, 102 So. 16 (1928); *Toelke v. Toelke*, 153 La. 697, 96 So. 536 (1923); *Guess & Albin v. Ham*, 183 So. 61 (La. App. 2d Cir. 1938).

85. *Succession of Keppel*, 113 La. 246, 36 So. 955 (1904); *Thompson v. Vance*, 110 La. 26, 34 So. 112 (1903); *Neal v. Lapleigne*, 48 La. Ann. 424, 19 So. 261 (1896); *Landreneau v. Caesar*, 153 So. 2d 145 (La. App. 3d Cir. 1963).

86. See *Prior v. Giddens*, 50 La. Ann. 216, 23 So. 337 (1897); cf. cases cited note 85 *supra*. But see *Webre v. Lorio*, 42 La. Ann. 178, 7 So. 460 (1890) (as to rights of husband's separate creditors); *Succession of Cason*, 32 La. Ann. 790 (1880), discussed note 66 *supra*.

ably more consistent with the purposes underlying the community system than alternative theories and may achieve greater equity between the spouses. Legislative re-evaluation of the interests of creditors and spouses may be desirable.

### *Ownership of Community Assets*

Under the separate entity theory the community as a legal personality would own all community assets.<sup>87</sup> The spouses, rather than owning any particular items of community property, would have only a residuary interest, like that of a partner, characterized as an incorporeal right,<sup>88</sup> in the remainder of the community assets left after termination of the community and payment of community debts. The Louisiana case law has never been consistent with such a position. Instead, it has espoused two alternative, opposing views: that the husband is sole owner of community property during the marriage, the wife having a mere "expectancy,"<sup>89</sup> or that the spouses are co-owners in indivision of the common assets from the moment they are acquired.<sup>90</sup> The co-ownership doctrine enjoys greatest acceptance in current jurisprudence<sup>91</sup> and will be considered separately as a major theory opposing the separate entity doctrine. First, however, the expectancy theory deserves some consideration for several reasons. The co-ownership doctrine has enjoyed modern acceptance in Louisiana largely because at one time it provided a solution to federal estate and income tax problems which no longer exist due to changes in federal tax law.<sup>92</sup> Further, as

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87. See 14 DURANTON, COURS DE DROIT CIVIL FRANCAIS n° 96, 102 (4th ed. 1834); 3 PLANIOL no. 901; 6 TOULLIER n° 82; 20 TROPLONG, DROIT CIVIL n° 306-322 (1850).

88. See note 23 *supra*.

89. See, e.g., Ramsey v. Beck, 151 La. 190, 91 So. 674 (1922); Succession of McCloskey, 144 La. 438, 80 So. 650 (1919); Succession of Emmot, 109 La. 359, 33 So. 368 (1902); Succession of Dumestre, 42 La. Ann. 1055 (1890); Belden v. Hanlon, 32 La. Ann. 85 (1880); Davis v. Compton, 13 La. Ann. 469 (1858); Guice v. Lawrence, 2 La. Ann. 226 (1847); Comment, 25 LA. L. REV. 159 (1964). See also note 71 *supra*.

90. E.g., Azar v. Azar, 239 La. 941, 120 So.2d 485 (1960); Thigpen v. Thigpen, 231 La. 206, 91 So. 2d 12 (1956); Fazzio v. Kreiger, 226 La. 511, 76 So. 2d 713 (1954); Succession of Wiener, 203 La. 649, 14 So. 2d 475 (1943); Phillips v. Phillips, 160 La. 813, 107 So. 584 (1926); Dixon v. Dixon's Executors, 4 La. 188 (1832); Comment, 25 LA. L. REV. 159 (1964).

91. See cases cited note 90 *supra*; Comment, 25 LA. L. REV. 159 (1964).

92. See, e.g., Bender v. Pfaff, 282 U.S. 127 (1930); United States v. Robbins, 269 U.S. 315 (1926); Henderson's Estate v. Commissioner, 155 F.2d 310 (5th Cir. 1946); Succession of Wiener, 203 La. 649, 14 So. 2d 475 (1943); Comment, 25 LA. L. REV. 159, 173-79 (1964).

criticism elsewhere<sup>93</sup> and subsequently herein<sup>94</sup> indicates, the co-ownership theory may be undesirable. If in the future it is discarded, the natural alternative would be a reversion to the "ownership in husband — expectancy in wife" doctrine, which is supported in several recent decisions,<sup>95</sup> though it is arguable that the separate entity doctrine would be preferable.

The notion that ownership of community assets vests solely in the husband during the marriage apparently originated in medieval France and Spain concurrently with creation of the wife's right to renounce the community on dissolution of the marriage.<sup>96</sup> The right of renunciation, designed to protect the wife from the faults of the husband's exclusive control of the community, was more acceptable in theory, if the wife did not own any part of the community assets during the marriage, but only had an expectancy therein which materialized if she did not renounce it, on dissolution of the marriage.<sup>97</sup> The austere dominance of the husband generally in the conjugal relationship, plus his exclusive legal power over the community rendered the expectancy theory plausible.<sup>98</sup> In France, Pothier, Toullier, and Dumoulin, and in Spain, Azevedo, Gutierrez, and Febrero apparently carried the "ownership-expectancy" doctrine forward.<sup>99</sup> Its first appearance in Louisiana was in *Guice v. Lawrence*,<sup>100</sup> decided in 1847, the court relying on Febrero as authority. The doctrine found continued acceptance until 1926 when the Louisiana Supreme Court adopted the co-ownership theory in *Phillips v. Phillips*.<sup>101</sup>

Sole ownership of the community in the husband, however plausible it may have been even as late as 1847, runs against the grain of modern social and legal realities. The prominence of the wife's position in the family, coupled with her generally in-

93. See Comment, 25 LA. L. REV. 159, 167-71, 181-86 (1964).

94. See notes 106-153 *infra* and accompanying text.

95. See *Monk v. Monk*, 243 La. 429, 144 So. 2d 384 (1962); *Daigre v. Daigre*, 230 La. 472, 89 So. 2d 41 (1950); *Rhodes v. Rhodes*, 190 La. 370, 182 So. 541 (1938); *Fleury v. Fleury*, 131 So. 2d 355 (La. App. 4th Cir. 1961); *First Nat'l Bank v. Coreil*, 145 So. 395 (La. App. 1st Cir. 1933).

96. See Comment, 25 LA. L. REV. 78, 85-87 (1964).

97. *Ibid.*

98. See generally MCKAY §§ 46-50, 52-54.

99. French authorities: POTHIER, *TRAITÉ DE LA COMMUNAUTÉ* n° 3 (1861 ed.); 6 TOULLIER n° 75-76; DUMOULIN, quoted in 3 PLANIOL no. 898. Spanish authorities: AZEVEDO 148; GUTIERREZ 223; FEBRERO, quoted in MCKAY § 1104.

100. 2 La. Ann. 226 (1847).

101. 160 La. 813, 107 So. 584 (1926).

creased legal freedom<sup>102</sup> and her control over the community,<sup>103</sup> militates against the expectancy theory. The fact that the wife contributes the produce of her separate property and her labors to the community has always been inconsistent with the doctrine.<sup>104</sup> Likewise, the numerous limitations on the husband's powers of control and management of the community make his position inconsistent with that of a sole owner.<sup>105</sup> Finally, along with the view that the husband is owner of the community has come the rule, already discussed and criticized herein, that his patrimony and the community are treated as one in claims by creditors.

The separate entity theory seems to provide a happy avoidance of these problems. As far as proprietary interest in the community is concerned, the husband and wife would be treated equally, each having only a residuary interest. The husband's powers of control, as well as the limitations thereon, would be consistent with his position as statutory agent for the community with power to administer its assets subject to special fiduciary responsibilities to the wife. The wife's right of renunciation presents no theoretical difficulty, since she would not become owner of any particular assets or liable for any community debts until dissolution of the community. Finally, the husband's inability to renounce would be consistent with his position as prime agent of the community in the majority of community transactions and a just balancing of interests *vis-à-vis* community creditors. The separate entity theory appears, then, preferable to the "ownership-expectancy" theory. Is it, however, more desirable than the co-ownership doctrine?

### THE CO-OWNERSHIP THEORY

The most obvious alternative to the separate entity theory, and, in fact, the view most widely accepted by Louisiana courts<sup>106</sup>

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102. See LA. R.S. 9:101-105 (1950).

103. The wife can bind the community as its express or implied agent, as a public merchant, and in various other ways. See Comment, 25 LA. L. REV. 201, 234-40 (1964). She can sue to enforce community rights when authorized by the husband. LA. CODE OF CIVIL PROCEDURE art. 695 (1960). She can dispose of her share of the community by will. LA. CIVIL CODE arts. 915, 916 (1870).

104. See LA. CIVIL CODE arts. 2334, 2386, 2402 (1870); Comment, 25 LA. L. REV. 159, 170 (1964).

105. See LA. CIVIL CODE arts. 150, 2334, 2404, 2425 (1870); LA. R.S. 9:2801-2804 (1950); Comment, 25 LA. L. REV. 159, 168-71 (1964).

106. See cases cited note 90 *supra*.

and French authorities<sup>107</sup> in recent years, is the concept that the community is a form of undivided co-ownership of the community property. Apparently, Louisiana spouses become co-owners of each individual piece of community property from the moment it is acquired.<sup>108</sup> Aside from the current acceptance of this position by the courts, however, the co-ownership doctrine rests on no more stable ground than the separate entity theory. As indicated elsewhere, there is little, if any, statutory authority for it,<sup>109</sup> and the practical considerations leading to its modern acceptance have ceased to exist.<sup>110</sup> Furthermore, many of the rules of conventional co-ownership conflict with extant community property law in several respects discussed below.

### *Proprietary Control*

In ordinary undivided co-ownership, each co-owner's interest in the property forms a part of his own patrimony and is thus normally subject exclusively to his proprietary control. One co-owner may mortgage or alienate his undivided interest without the consent of the others,<sup>111</sup> and after a sale the vendee takes the place of the vendor as co-owner.<sup>112</sup> On the other hand, an alienation or mortgage by one co-owner, purporting to affect the entire common property, without the other co-owner's consent, is valid only for the contracting co-owner's interest.<sup>113</sup> Neither of these principles is applicable as between spouses in community. Normally, the husband has exclusive power to alienate and encumber community property without the wife's consent;<sup>114</sup> the wife may only do so when specifically authorized by the husband.<sup>115</sup> Further, it appears that the husband's power to alien-

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107. See 8 AUBRY ET RAU n° 505; 16 BAUDRY-LACANTINERIE n° 249; 3 PLANIOL no. 905.

108. See cases cited note 90 *supra*.

109. Comment, 25 LA. L. REV. 159, 167-71 (1964).

110. *Id.* at 178-79. See also note 92 *supra* and accompanying text.

111. See *Crownover v. Randle*, 21 La. Ann. 469 (1868); *Caraway v. Hebert*, 182 So. 164 (La. App. 1st Cir. 1938); Comment, 22 TUL. L. REV. 611, 613 (1948).

112. *Crownover v. Randle*, 21 La. Ann. 469 (1868).

113. *Baker v. Lee*, 49 La. Ann. 874, 21 So. 588 (1897); *Janney v. Lillard*, 35 La. Ann. 1198 (1883); *Crownover v. Randle*, 21 La. Ann. 469 (1868).

114. LA. CIVIL CODE art. 2404 (1870). The wife's consent is required, however, if the property stands in her name, or in the names of both husband and wife and the wife has made and recorded a declaration that her consent is required. *Id.* art. 2334, as amended 1962.

115. *Roccaforte v. Barbin*, 212 La. 69, 31 So.2d 521 (1947); *Bywater v. Enderle*, 175 La. 1098, 145 So. 118 (1932); *Liberal Fin. Co. v. Washington*, 62 So.2d 545 (La. App. Orl. Cir. 1953); *Vanzant v. Morgan*, 181 So. 660 (La. App. 2d Cir. 1938).

ate and encumber pertains only to his and his wife's interests combined, not to his undivided interest. If the husband could sell his undivided interest in all or a part of the community during the marriage, since only the wife's interest would remain, the result would be either a termination of the community at a time not authorized by law,<sup>116</sup> or a partition of community property before termination of the community.<sup>117</sup> A similar result would accrue upon enforcement of a mortgage on the husband's undivided interest.

### *Community Debts and Creditor's Rights*

The respective liabilities of the spouses for community debts do not comport with the rules applicable to conventional co-owners. If one of several co-owners contracts debts related to the use, preservation, or improvement of co-owned property, he can be held liable only in proportion to his interest in the property.<sup>118</sup> If the contracting co-owner voluntarily satisfies a debt and it was necessary for the preservation or maintenance of the property,<sup>119</sup> or if the other co-owners consented to or directly benefited from the expenditure,<sup>120</sup> he will be entitled to pro rata recovery from the other co-owners, but otherwise must bear the entire expense himself.<sup>121</sup> The husband, however, is personally liable for the whole of all community debts, even if contracted by the wife,<sup>122</sup> while the wife is not personally liable<sup>123</sup> unless she

116. The community may only be ended in the ways specifically provided by law; there is no provision allowing the husband, at his will, to terminate the community. See Comment, 25 LA. L. REV. 241 (1964).

117. The Code only specifically authorizes partition of the community at dissolution of the marriage. LA. CIVIL CODE art. 2406 (1870). Additionally, the jurisprudence allows partition under article 155 upon separation from bed and board, e.g., *Talbert v. Talbert*, 199 La. 882, 7 So.2d 173 (1942); *White v. White*, 153 La. 313, 95 So. 791 (1923), and also upon a judgment of separation of property, see *Robertson v. Davis*, 9 La. Ann. 268 (1854); *Davcock v. Darcy*, 6 Rob. 342 (La. 1844).

118. See *Fox v. Succession of Broussard*, 161 La. 949, 109 So. 773 (1926); *Whatley v. McMillan*, 152 La. 978, 94 So. 905 (1922); *Suthon v. Viguerie*, 127 La. 538, 53 So. 855 (1910); *Suthon v. Laws*, 127 La. 531, 53 So. 852 (1910); *Winter v. Atkins*, 28 La. Ann. 650 (1876); *Lalland v. Wantz*, 18 La. Ann. 289 (1866); *Fuselier v. Lacour*, 3 La. Ann. 162 (1848).

119. See *Huckaby v. Texas Co.*, 227 La. 191, 78 So. 2d 829 (1955); *Murphy v. Murphy*, 136 La. 17, 66 So. 382 (1914); *Toler v. Bunch*, 34 La. Ann. 997 (1882); *Southwestern Gas & Elec. Co. v. Liles*, 16 La. App. 500, 133 So. 835 (2d Cir. 1931).

120. *Smith v. Wilson*, 10 La. Ann. 255 (1855); *Southwestern Gas & Elec. Co. v. Liles*, 16 La. App. 500, 133 So. 835 (2d Cir. 1931).

121. See *Murphy v. Murphy*, 136 La. 17, 66 So. 382 (1914); *Toler v. Bunch*, 34 La. Ann. 997 (1882); *Smith v. Wilson*, 10 La. Ann. 255 (1855); *Perez v. Guitard*, 14 Orl. App. 191 (La. App. Orl. Cir. 1916).

122. See notes 64, 70 *supra* and accompanying text.

123. See cases cited note 61 *supra*.

expressly binds herself for the debt.<sup>124</sup> Thus, if the husband and wife jointly purchase property inuring to the community, apparently the husband alone will be liable for the purchase price,<sup>125</sup> while if two strangers are joint purchasers each is liable only for his share.<sup>126</sup> True, if the husband satisfies a community debt with his separate funds, he may have a claim for reimbursement from the community, but this right may only be exercised at termination of the community.<sup>127</sup>

The analogy between conventional co-ownership and the community breaks down further in claims by the spouses' separate creditors against community property. The undivided interest of a co-owner, since it comprises part of his patrimony, is subject to seizure by his creditors<sup>128</sup> like any other asset. However, as stated previously, community property is totally beyond the reach of the wife's separate creditors,<sup>129</sup> while the reverse is true for creditors of the husband.<sup>130</sup> However, in the recent case of *Fazzio v. Krieger* dictum based on the co-ownership doctrine indicates that community property will only be liable for the husband's separate debts up to his half interest in the property.<sup>131</sup>

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124. See LA. R.S. 9:103 (1950); *Shell Pet. Corp. v. Calcasieu Real Estate & Oil Co.*, 185 La. 751, 170 So. 785 (1936); *United Liab. & Acc. Ins. Co. v. Haley*, 178 La. 63, 150 So. 833 (1933); *Smith v. Viser*, 117 So.2d 673 (La. App. 2d Cir. 1960); *O'Dowd v. McNeill*, 110 So.2d 755 (La. App. Orl. Cir. 1959); *Bruno v. Williams*, 76 So.2d 41 (La. App. Orl. Cir. 1954); *Veazey v. Rogers*, 6 So.2d 170 (La. App. Orl. Cir. 1942).

125. Although there is no direct authority for this proposition in the jurisprudence, it seems to follow from the cases holding the husband alone liable for community debts contracted by the wife. See, e.g., *Smith v. Viser*, 117 So.2d 673 (La. App. 2d Cir. 1960); *Bruno v. Williams*, 110 So.2d 755 (La. App. Orl. Cir. 1954). Although the wife could bind herself for the purchase price under LA. R.S. 9:301 (1950), the courts have been reluctant to find liability and require clear and convincing proof of her intention to bind herself or her estate. See, e.g., *United Life & Acc. Ins. Co. v. Haley*, 178 La. 63, 150 So. 833 (1933); *Rouchon v. Rocamora*, 84 So.2d 873 (La. App. Orl. Cir. 1956); *Alpha v. Aucoin*, 167 So. 835 (La. App. Orl. Cir. 1936); *Wilson & Gandy v. Cummings*, 50 So. 436 (La. App. 2d Cir. 1933). Thus, it seems that the mere fact that the wife joined in the act of sale would not render her personally liable. However, she may be liable if she binds herself in *solido* with the husband on a promissory note representing the purchase price. See, e.g., *Howard v. Cardella*, 171 La. 921, 132 So. 50 (1931); *Friendly Loan, Inc. v. Morris*, 142 So.2d 810 (La. App. 1st Cir. 1962).

126. *Lallande v. Wantz*, 18 La. Ann. 289 (1866).

127. See notes 79, 82 *supra* and accompanying text.

128. Cf. *Baker v. Lee*, 49 La. Ann. 874, 21 So. 588 (1897); *Janney v. Lillard*, 35 La. Ann. 1198 (1883). See Comment, 22 TUL. L. REV. 611, 613 (1948).

129. See note 63 *supra* and accompanying text.

130. See note 66 *supra* and accompanying text.

131. 226 La. 511, 524, 76 So.2d 713, 717 (1954): "Some of these cases [holding community assets subject to seizure and sale by the husband's prenuptial creditors] were founded on the theory . . . that the wife's interest in the community property was only an expectancy or residuary interest that did not come



Although the co-ownership theory logically dictates such a rule, its application would lead to the same prohibited consequences, previously discussed, which would flow from the sale of a spouse's half interest in all or a part of the community: either a termination of the community in a manner unauthorized by law or an equally impermissible partition of community property prior to termination of the community.<sup>132</sup> Further, such a result would conflict with the specific provision of the Code that a creditor cannot require a separation of property between husband and wife.<sup>133</sup>

Apparently, compensation by operation of law<sup>134</sup> would occur between a debt owed to an individual creditor of one co-owner and a debt owed by such creditor to the co-owners jointly, up to the amount of the debtor-co-owner's share of the joint claim, i.e., in proportion to his interest in the co-owned property.<sup>135</sup> However, there can be no compensation between separate debts of the wife and debts owed by a third person to the community.<sup>136</sup> The compensability of the husband's debts against debts owed to the community is undecided. Arguably, before *Fazzio v. Krieger*,<sup>137</sup> full compensation might be allowed on the basis that community property was liable for the whole amount of the husband's separate debts. Since the *Fazzio* dictum that the community liability for the husband's debts will be limited to his half interest in the community,<sup>138</sup> however, it seems that compensation, if allowed at all, should operate only up to his half interest in the community right in question.

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into existence until the community was dissolved and liquidated. We are aware that this theory was repudiated . . . in *Phillips v. Phillips* . . . which holds that the wife has the absolute ownership of half of the community property during the existence of the community. . . . *These cases, however, would still be authority for the proposition that the husband's half interest in the community is liable for his debts contracted before marriage.*" (Emphasis added.)

132. See notes 116-117 *supra* and accompanying text.

133. LA. CIVIL CODE art. 1991 (1870).

134. See LA. CIVIL CODE arts. 2207-2209 (1870).

135. No direct authority for this proposition has been found, but the conclusion follows from the rule that co-owners are joint obligees on claims arising out of the common ownership. See *Dauzat v. Kelone*, 65 So. 2d 924 (La. App. 2d Cir. 1953). Compensation does occur between debts owed individually by one of several joint obligees to a third person and debts owed by the latter to the joint obligees together. *Lanfitt v. Clinton & P. H. R.R.*, 2 Rob. 217 (La. 1842).

136. *Bailey v. Alice C. Plantation & Refinery, Inc.*, 152 So. 2d 336 (La. App. 1st Cir. 1963).

137. 226 La. 511, 76 So. 2d 713 (1954).

138. See note 131 *supra*.

*Reciprocal Rights and Duties*

Further differences between normal co-ownership and that possible between spouses exist in relation to the reciprocal rights and duties between co-owners. For example, a co-owner in possession has an enforceable obligation to preserve and maintain the co-owned property,<sup>139</sup> and may be enjoined from such treatment of the common property as would constitute waste.<sup>140</sup> The husband, however, has no such general duties as administrator of the community assets; he is accountable to the wife only for those transactions specifically proscribed by statute.<sup>141</sup> Generally, the wife's only relief during the community against the husband's mismanagement is through an action for separation of property.<sup>142</sup>

A greater separation of interest is generally recognized between co-owners than between husband and wife. Thus, while the general rule is that one co-owner cannot acquire the interest of the other by acquisitive prescription,<sup>143</sup> such is possible if the co-owner's possession is clearly hostile to the other.<sup>144</sup> It seems clear, however, that under no circumstances can either spouse prescribe against the other's half interest in community property.<sup>145</sup>

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139. See *Stinson v. Marston*, 185 La. 365, 169 So. 436 (1936); *Moreira v. Schwan*, 113 La. 643, 37 So. 542 (1904).

140. See *Gulf Ref. Co. v. Carroll*, 145 La. 229, 82 So. 277 (1919); *Breaux v. Albert Hanson Lumber Co.*, 125 La. 421, 51 So. 444 (1910); *Cotten v. Christen*, 110 La. 444, 34 So. 597 (1903).

141. See *Mackenroth v. Pelke*, 171 La. 842, 132 So. 365 (1931); *Frierson v. Frierson*, 164 La. 687, 114 So. 594 (1927); *Bartoli v. Huguenard*, 39 La. Ann. 412, 2 So. 196 (1887); *Succession of Boyer*, 36 La. Ann. 506 (1884). For restrictions on the husband's powers of administration see statutes cited note 105 *supra*; Comment, 25 LA. L. REV. 514 (1965).

142. See LA. CIVIL CODE arts. 2404, 2425-2437 (1870); Comments, 25 LA. L. REV. 241, 242-48 (1964); 25 LA. L. REV. 514, 524-29 (1965). An exception to the general rule stated above is the wife's right to annul an unauthorized sale of the family home under LA. R.S. 9:2801-2804 (1950). See *Reymond v. Louisiana Trust & Savings Bank*, 177 La. 409, 148 So. 663 (1933). It has been argued that other exceptions should be made for restrictions imposed by article 2404, but the cases seem opposed to such. See Comment, 25 LA. L. REV. 514, 527 (1965).

143. *Williams v. Harrell*, 132 La. 1, 60 So. 699 (1913); *Simon v. Richard*, 42 La. Ann. 842, 8 So. 629 (1890).

144. See *Lee v. Jones*, 224 La. 231, 69 So.2d 26 (1954); *Sanders DeHart v. Continental Land & Fur Co.*, 205 La. 561, 17 So.2d 827 (1944); *Watkins v. Zeigler*, 147 So.2d 435 (La. App. 2d Cir. 1962); *British American Oil Co. v. Grizzaffi*, 135 So.2d 559 (La. App. 1st Cir. 1961).

145. *Cf. Crouch v. Richardson*, 158 La. 822, 104 So. 728 (1925). The husband's possession would be in his capacity as head and master of the community and, thus, could not be adverse to the wife. To permit the wife in possession without consent of her husband to prescribe against him would seem contrary to the spirit of LA. CIVIL CODE art. 119 (1870). "The husband and wife owe to

*Termination and Partition*

Essential to conventional co-ownership is the right of a co-owner to end the common regime at any time by demanding a partition of the common property.<sup>146</sup> The community, however, may be terminated only in the ways specifically authorized by law, such as by dissolution of the marriage, by the wife's action for separation of property, or by judicial decree in the absence of one spouse.<sup>147</sup> Further, as between the spouses themselves, there can be no partition of any piece of community property prior to termination of the community.<sup>148</sup> The obvious policy of the law is to keep the community intact concurrently with the marriage, since the purpose of the common fund is to support family expenses. Lastly, nothing appears to prevent one of several co-owners, who together own several pieces of property, from partitioning each piece separately at any time. Even at termination of the community, however, there can be no piecemeal partition of individual items of community property without a prior liquidation and settlement of the whole community.<sup>149</sup> The purpose of this rule is to assure an orderly community settlement and to protect the preferred status of community creditors.<sup>150</sup>

*Summary and Evaluation*

It should be apparent from the preceding discussion that at best the community can only be regarded as a peculiar type of co-ownership, drastically different from normal conventional co-ownership in indivision. The essential and unique principles governing the partition and termination of the community, its management, and the legal relations between spouses themselves and between the community and third persons prevent anything more than a vague analogy with conventional co-ownership. In this light, treatment of the community as a form of co-ownership would probably be more confusing than helpful. The jurisprudence reveals that extended application of the co-ownership doc-

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each other mutually, fidelity, support and assistance," and inconsistent with the husband's powers of administration under LA. CIVIL CODE art. 2404 (1870).

146. See LA. CIVIL CODE arts. 1289, 1297, 1299, 1308 (1870).

147. The modes of terminating the community are extensively discussed in Comment, 25 LA. L. REV. 241 (1964).

148. See note 117 *supra*.

149. *Daigre v. Daigre*, 230 La. 472, 89 So.2d 41 (1950); *Tomme v. Tomme*, 174 La. 123, 139 So. 901 (1932).

150. See *Daigre v. Daigre*, 230 La. 472, 478-82, 89 So.2d 41, 44-45 (1950).

trine may create anomalies other than those disclosed in the present discussion.<sup>151</sup> With the added consideration that the practical reasons leading to adoption of the doctrine in *Phillips v. Phillips*<sup>152</sup> have long since ceased to exist,<sup>153</sup> the wisdom of perpetuating it is highly questionable.

#### CONCLUSION

If the status quo of community property law in Louisiana is to be maintained, attempts to define the juridical nature of the community in terms of other superficially similar institutions or forms of ownership appear doomed to failure. Specific statutory provision precludes extensive analogy with the conventional partnership. Present conflicts between certain community property laws and those which would apparently flow from the separate entity and the co-ownership theories prevent any logically consistent application of either. Apparently, one must be presently content to regard the community as a peculiar form of legal partnership, the precise nature of which can only be derived by reference to the unwieldy mass of community property law. Uncertain questions in particular cases must be resolved not by reasoning from an abstract theory, but by analogizing from extant rules unique to the community system and by resorting to the fundamental purposes of the community as applied to present realities of the conjugal and familial relationships. Taking this approach as fundamental, however, one may well conclude that the present rules tending to merge the common patrimony with the husband's separate estate should be abandoned and that the community should be treated as a unique legal partnership existing apart from the spouses as a separate legal entity.

*George A. Kimball, Jr.*

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151. See Comment, 25 LA. L. REV. 159, 181-84 (1964).

152. 160 La. 813, 107 So. 584 (1926).

153. See note 92 *supra* and accompanying text.